Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-529

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

HOU HAWAIIANS,

Petitioner,

v.

STATE OF HAWAII, et.al.,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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1. Reasons why this Court should accept certiorari in this case:

There are several compelling reasons why this court should accept certiorari in this case. These can be summarized as follows:

a. The Ninth Circuit has treated Native Hawaiians differently than other Native Americans, excluding this aborigi-

nal group from the full protection of the Federal law applicable to all other Native Americans. The decision aversely affects other Pacific Island aboriginal groups within the jurisdiction of the United States, such as the Micronesians and Samoans.

b. The Ninth Circuit has made new law by deciding that a tribe or governing body must meet the stringent recognition requirements under the Indian Reorganization Act in order to be considered "recognized" for purposes of 28 U.S.C. §1362. Such a ruling is unsupported and unjustified by Congressional intent, prior case law, or logic, since "recognition" under the IRA entitles the tribe to a host of Federal benefits while "recognition" under §1362 only allows the tribe access to Federal Court. Such a ruling will be detrimental to Native Americans in

general.

c. The "Catch-22" procedure employed in the District Court's dismissing of the case for lack of jurisdiction irrespective of what evidence might be introduced at trial and the Ninth Circuit's then dismissing for lack of jurisdiction because Petitioner had failed to prove that it was "recognized" could be used to destroy the rights of anyone, Native American or otherwise, and is sufficiently a departure from proper procedure that this Court should review this case under its supervisory powers.

d. If this court does not accept certiorari, there will be no way for Native Hawaiians to obtain any compensation or damages for the State's past abuse of the trust relationship in failing to distribute the homestead lands or expend

§5(f) funds for their benefit; additionally, the decision below may even deny Native Hawaiians any relief in Federal court to obtain enforcement of the 5(f) / homelands trust.

e. As this case involves a Federal-State compact and a condition of Statehood which the Ninth Circuit has ruled is unenforcable by any of its beneficiaries for past neglect, the case presents an important issue of Federal-State relations and, by implication, Federal relations with the Pacific trust territories.

As previously argued in the Petition for Certiorari, the Ninth Circuit has ruled that neither Petitioner nor its governing body has been recognized by the Secretary of Interior and that, therefore, access to Federal Court under 28 U.S.C. §1362 is unavailable to Petitioner. This ruling was arrived at by means of a

"Catch-22"; the District Court first dismissed the complaint on the basis that, whatever Petitioner could prove at trial regarding its tribal status or Secretarial recognition, the §5(f) / homelands trust claims could not be addressed under §1362. The Ninth Circuit, unable to uphold the district court's illogic, dismissed the case because Petitioner had not proven its tribal status or Secretarial recognition.

By so ruling, the Ninth Circuit has denied Native Hawaiians any access to Federal court to obtain compensation for damages for the State of Hawaii's past violations of the 5(f) / homelands trust during its 26 years of statehood. See Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 588 F.2d. 1216 (9th Cir. 1978) ("Keaukaha I") , cert. den. 444 U.S. 826 (1979). The effect of

these two decisions is obviously to discriminate against Native Hawaiians vis a vis other Native Americans. Compare, Oneida Indian Nation of New York v. State of New York, 691 F.2d. 1070 (2nd. Cir. 1982) and Oneida Indian Nation of New York v. County of Oneida, 84 L.Ed. 2d. (Federal court has jurisdiction over Oneida Indians' claim for 190 years of back rent from the State of New York.)

The Ninth Circuit's decision may go even further and completely bar access to Federal Court for Native Hawaiians to enforce the §5(f) / homelands trusts, even for prospective injunctive and declaratory relief.[1] Although, in 1984, a different

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1. In its opposition brief, the State has argued, in a contradictory way, both that Petitioner has access to Federal court and that it does not. See arguments at pages 7 and 10 of the Brief. The State's "concession" that Petitioner would have access to Federal Court "in an appropriate case" (whatever it feels that is) and its citation to Ahuna v. Department of Hawaiian Home Lands, 64

panel of the Ninth Circuit ruled that a Native Hawaiian community association could bring an action under 28 U.S.C. §1983 to enforce these laws, see Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, ("Keaukaha 2"), 739 F.2d. 1467 (9th Cir. 1984), the panel below has arguably foreclosed this possibility in its opinion, although it declined to overrule the previous panel's year-old decision. See Price v. State of Hawaii, 764 F.2d. at 631.

For these reasons, it is imperative that this court accept certiorari of this case.

Haw. 327, 640 P.2d. 1161 (1982) is misleading and dangerous; in Ahuna, because the State raised the claims of soverign immunity and a lack of a private right of action for the first time on appeal, the Hawaii Supreme Court ruled that the claims were not properly before it.

2. The State's reasons for this court's declining certiorari are unconvincing.

The State has advanced several reasons for this court's declining certiorari in a section entitled "Reasons for Granting the Writ." The State's arguments are insubstantial or result from misinterpretations of the opinion below.

a. The State's argument that no other Native Hawaiian group has ever claimed to be "Indian" is unsupported by the record, irrelevant and untrue.

The State argues that no other Native Hawaiian group has ever claimed to be an "Indian tribe or band" or claimed that its members are "Indians", and that, while in the court, they litigate as "Native Hawaiians." There is no evidence in the record to support such a claim and reported case authority contradicts it. [2].

2. In Keaukaha 1, the Native Hawaiian community association claimed "that, as native Hawaiians, they should receive the benefits of cases that

Even if the claim was true, it is irrelevant to the issues before this court and should be disregarded.

b. The jurisdictional reach of §1362 is not limited to land claims where the United States holds the title to the land in trust for individual Indians or a tribe.

The State claims, on page 8 of its brief, that the Ninth Circuit ruled that §1362 is limited to land claims where the United States holds title to the land in trust, and that "this is in accord with the decision of every court which has addressed the jurisdictional reach of §1362."

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have allowed native Americans (American Indians) a private federal right of action" under the "co-plaintiff" doctrine. See Keaukaha 1, 588 F.2d. at 1224, n. 7.

The State's assertion is contradicted by this Court's decision in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 F.2d 463, 96 S.Ct. 1634, 48 L.Ed. 2d. 96 (1976), a case which did not even involve land, but rather, involved state taxes on motor vehicles and cigarettes. In describing the power of the United States to bring actions "as the tribe's trustee", this court specifically quoted its previous decision in United States v. Rickert, 188 U.S. 432 (1903):

> "'[T]he decision [that the United States had the requisite interest] rested on a broader foundation than the mere holding of a legal title to land in trust, and embraced the recognition of the interest of the United States in securing immunity to the Indians from taxation conflicting with the measures it had adopted for their protection.' 224 U.S. at 441.

> Here, the United States could have made the same attack on the State's assertion of taxing power as was in fact made by the Tribe. Heckman v. United States, supra. We think that the legislative history of §1362, though by no means dispositive, suggests that in certain respects tribes suing under this section were to be accorded treatment similar to that of the United States had it sued in their behalf." 425 U.S. at 473-4.

See also Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F. Supp. 1359, 1350 (E.D. Wash. 1978), aff'd and rev'd on other grounds, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d. 10, a case also involving §1362 jurisdiction over State taxes on Indian personal property.

In that portion of the opinion below discussed by the State, the Ninth Circuit actually assumed that Petitioner did not qualify for jurisdiction under §1362, and discussed the possibility that Petitioner

might qualify under the judicially created "co-plaintiff" doctrine as a non-recognized tribe or a collection of individuals. The Ninth Circuit did not seek to limit §1362 to situations where the "co-plaintiff" doctrine could also apply.[3]

c. The Eleventh Amendment does not bar a suit for damages against the State under §1362.

According to the State, the Ninth Circuit has ruled that Petitioner's suit for damages under 28 U.S.C. §1362 is barred by the Eleventh Amendment and that this principle is "too well established to

3. The "co-plaintiff" doctrine, which allows individual Indians access to Federal Court, is indeed restricted to Federal land trust situations, (see Agua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d. 1184, 1186 (9th Cir. 1971)), but was not relied upon by Petitioner in the action below, and is only relevant if it is determined that Petitioner cannot qualify for §1362 jurisdiction. While the District Court mistakenly equated the "co-plaintiff" doctrine with §1362, the Ninth Circuit, notably, was unable to uphold the District Court's opinion on this ground.

require further review" by this court.

Assuming that the Ninth Circuit had so ruled, such a ruling would contradict all of the Federal case law since this court's decision in Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, 425 F.2d 463, 96 S.Ct. 1634, 48 L.Ed. 2d. 96 (1976), and would justify acceptance of certiorari and reversal by this court. See Confederated Tribes of the Colville Indian Reservation v. State of Washington, 446 F. Supp. 1359, 1350 (E.D. Wash. 1978), aff'd and rev'd on other grounds, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed. 2d. 10, (damages for interference with cigarette businesses) Oneida Indian Nation of New York v. State of New York, 691 F.2d. 1070 (2nd. Cir. 1982), (back rent and possession of land) Cayuga Indian Nation of New York v. Cuomo, 565 F. Supp. 1297 (1983) (back rent and posses-

sion of land), Charrier v. Bell, 547 F. Supp 580 (D.C.La 1982) (recovery of value of Indian artifacts), Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. State of Wisconsin, 595 F. Supp. 1077 (1984) (retroactive monetary relief for State's violation of hunting and fishing rights), Aguilar v. Kleppe, 421 F. Supp 433, 436 (D. Alaska 1976) (dicta.)

The portion of the opinion below cited by the State, however, assumes that Petitioner did not qualify for §1362 jurisdiction and held merely that the Eleventh Amendment would bar a suit for damages under 28 U.S.C. §1331.

3. Conclusion

For the above reasons, this Court should accept certiorari of this case.

In 25 years of administration of the homelands / §5(f) trust, the State has

distributed approximately 8 percent of the homelands to the beneficiaries. At the present rate, it would take an additional 275 years for the State to distribute the remainder of the homelands. The State has claims that it lacks the money to distribute the homelands any faster, but has failed to use any of the §5(f) land income to fund the homelands program. For whatever reason, Interior has been disinclined to enforce the trust in favor of the beneficiaries.

If the beneficiaries of the trust are not allowed access to Federal court to enforce the trust, the alternatives are:

a. that the trust will not be enforced, and the homelands not distributed, i.e., continuation of the present situation;

b. that Congress appropriate additional money to fund the distribution of

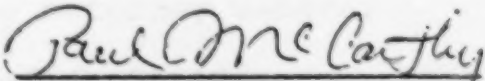
the homelands;

c. that Congress, deciding the trust is a failure, devise some other means of compensating the Native Hawaiians, such as authorizing the settlement of native claims or appropriating funds for "reparations".

The choice between denial of rights to Native Hawaiians and apropriation of substantial additional funds by Congress is not inevitable. At the time of Statehood, Congress transferred substantial amounts of income-producing Federal land to the State along with the homelands. The §5(f) lands have produced far greater income than was needed to improve and distribute the homelands, yet the State has, by their own admission, refused to expend any of this money on the homelands program. The trust beneficiaries sould be

accorded a fair opportunity in court to rectify this failure.

DATED: Honolulu, Hawaii, December 26, 1985.



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the within were delivered to the office of the following person on December 27, 1985.

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